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90-291

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MATTHEW GRUBER, Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE
STATE OF OREGON, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's Constitutional right to due process was violated when his medical license was placed in jeopardy by the action of the Board of Medical Examiners which ordered the Petitioner to submit to a competency examination (which would result in revocation of his license if failed) without ever giving him a due process hearing to contest the order or present evidence in his own behalf?

2. Or. Rev. Stat. § 677.420(2) (1987)¹ allows the Board of Medical Examiners to order a medical licensee to take a medical competency examination upon a

¹ All references to Oregon statutes and administrative rules are to those which were in effect during the proceedings, i.e., those appearing in the 1987 Oregon Revised Statutes. The 1989 Oregon Legislature made several changes in these statutes at the request of the Board of Medical Examiners, which changes were obviously designed to respond to objections made by Petitioner during the appeal process.

finding of reasonable cause that the licensee is unable to practice medicine safely. The Board of Medical Examiners and the Oregon appellate courts have interpreted this statute to permit the Board to make this finding of reasonable cause without affording the licensee a due process hearing. Is such an interpretation of this statute void under the due process clause of the U.S. Constitution when failure of such medical competency examination would result in a revocation of the license?

3. Whether Or. Rev. Stat. § 677.420(1) (1987), which allows the Board of Medical Examiners to order any medical licensee to take a medical competency examination (which would result in revocation of his or her license if failed) without any reason or justification whatsoever, is void as violative of the due process clause of the U.S. Constitution?

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BOARD OF MEDICAL EXAMINERS OF THE
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*PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
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The Petitioner Matthew Gruber respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon, entered in the above-entitled proceeding on February 22, 1990. .

OPINIONS BELOW

1. On the 10th day of August, 1987, the Oregon Board of Medical Examiners issued an Order requiring the Petitioner to

take a medical competency examination. This Order is reproduced in the Appendix at App-16.

2. On the 13th day of June, 1988, the Oregon Board of Medical Examiners issued an Order Adopting Hearings Officer's Proposed Findings of Fact, Conclusions of Law, Order and Opinion, and which revoked Petitioner's license to practice medicine as of August 15, 1988. This Order is reproduced in the Appendix at App-18.

3. The order of the Board of Medical Examiners revoking Petitioner's medical license was appealed to the Oregon Court of Appeals. After briefing and oral argument, on August 16, 1989, the Court of Appeals affirmed the Board's order revoking Petitioner's license without issuing an opinion. The order affirming without an opinion is reproduced in the Appendix at App-38.

4. A Petition for Review to the Oregon Supreme Court was filed and on February 22, 1990, the Oregon Supreme Court denied review without issuing an opinion. This order is reproduced in the Appendix at App-39.

5. A Petition for Reconsideration (Rehearing) was filed in the Oregon Supreme Court and on April 26, 1990, the Oregon Supreme Court denied the Petition for Reconsideration without issuing an opinion. This order is reproduced in the Appendix at App-40.

JURISDICTION

The judgment of the Oregon Supreme Court sought to be reviewed was entered February 22, 1990. A motion for rehearing or reconsideration was filed in the Oregon Supreme Court on March 15, 1990. The Oregon Supreme Court denied that motion for reconsideration on April 26, 1990. Juris-

diction for this Petition for Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1257(a) (1988).

STATUTES INVOLVED

The following statutes, rules and orders involved in this appeal are reproduced in the Appendix at the pages noted.

U.S. Const. amend. XIV, § 1 . . .	App-1
Or. Rev. Stat. § 183.484 (1987) .	App-1
Or. Rev. Stat. § 677.190 (1987) .	App-5
Or. Rev. Stat. § 677.270 (1987) .	App-10
Or. Rev. Stat. § 677.415 (1987) .	App-11
Or. Rev. Stat. § 677.420 (1987) .	App-13
Or. Admin. R. 847-10-070	App-14

STATEMENT OF THE CASE

This case has a long and complex procedural history. Briefly, the Petitioner is a doctor of medicine who has practiced for more than thirty five years. In

1986 and 1987 the Board of Medical Examiners of the State of Oregon [hereinafter "the Board"] called the Petitioner in for four separate "informal interviews" regarding his ability to practice medicine.² These interviews were triggered by the 1984 suspension of Petitioner's privileges at the Salem (Oregon) Hospital. There have never been any complaints made against Petitioner by any patient of his, or by anyone else on behalf of a patient. The Petitioner brought a civil lawsuit against the Salem Hospital for violation of his civil rights in the suspension of his hospital privileges. (Ex. 13 at pg. 4).

² Or. Rev. Stat. § 677.415 (1987) provides in part that during an investigation the Board "may request an informal interview with the licensee." Or. Rev. Stat. § 677.190(23) (1987) provides that "[r]efusing an invitation for an informal interview with the board requested under ORS 677.415" is one of the grounds for which the Board may suspend or revoke a license to practice medicine.

That lawsuit is still pending and is awaiting trial.

The four informal interviews were spread over a year's time. (Ex. 101; Ex. 13 at pg. 4). Two of these meetings were held in October 1986. (Ex. 13 at 4.) Two subsequent meetings were held in May and July of 1987.

From the very beginning the Petitioner objected to the adversarial nature of the "informal interviews," although the Board members continued to contend that they were merely informal. Tr. 43, 87-90, 92. The Petitioner further objected to the Board's refusal to allow him to see his own file, to present him with a list of charges against him, and to allow him to present evidence on his own behalf. At one point the Petitioner and one of the Board members engaged in a rather heated argument about whether or not it was an adversarial pro-

ceeding, as opposed to a simple informal interview. Tr. 43.

In the first meeting Dr. Drips made the following comment: "DR. DRIPS: Let me clarify this a little bit. The issue is one of medical competence. It's true that this came about as a result of the hospital action, but the issue that the Board has to face is much more global." Tr. 22. Later in that first meeting Dr. Drips stated: "The issue really kind of boils down to whether or not you should be considered for a competency investigation." Tr. 56-57.

Between the October 10, 1986, meeting and the May 6, 1987, meeting with the investigative committee, Petitioner's office records were subpoenaed, and ultimately the Board agreed to review only 20 records at random from Petitioner's thousands of case records. These were submitted to an anonymous Salem doctor for re-

view. Tr. 86-87. The Board made complete copies of all of these charts. Tr. 103. These charts, the reviewer's written report, and Petitioner's written response to the reviewer's report, were all considered by the Board in arriving at its conclusion that Petitioner should be required to take the FLEX examination, Tr. 100, but they were not included in the appellate record by the Board. The Oregon Court of Appeals denied Petitioner's motion to include these documents in the record.

In the May 6, 1987, interview the Petitioner stated the following objections to the proceeding:

DR. GRUBER: It is on the advice of counsel that I will appear today according to the statute but because I had not been informed of what matters were going to be discussed or given any of the protections of which my appearance here should and there's no opportunity of medical evidentiary material to be presented or witnesses present at previous meetings and that at this meeting I should decline to

respond on the basis that it would be adverse and tend to incriminate me and that should request that the Committee take action on the information it has available to them and that we proceed before the Board, if the Board elects to take action where full evidentiary and legal protections obtain and if necessary go onto court from there.

* * *

DR. GRUBER: [This hearing] has all the trappings of a formal hearing including the taping, the utilization of that material in a future proceeding which may be adverse to me and may be detrimental to me. * * * You did not even give me the courtesy of giving me a copy of this so that I could prepare to respond and that I was expected to respond spontaneously to the care that I may have given over a period of time to something, somebody. That's neither a fair hearing or a fair proceeding. Tr. 87-89.

After this statement one of the Board members responded:

DR. CORTESE: Since he refuses to answer questions, there is no use of us beating our heads against the bush. I would move that we recommend to the Board that we proceed with formal hearing. Tr. 90.

To which the Petitioner responded:

DR. GRUBER: Fine. Then I would be

notified of what allegations are against me and that in further of my statement, I have been asked by my attorneys to ask for three pieces of information. 1. Access to or copy of my file, including all allegations that have been presented to you, 2. a copy of the Administrative Rules under which this Committee operates, 3. and a transcript of this hearing. Tr. 90.

Then at the beginning of the July 8, 1987, interview with the full Board, the Board refused to allow Petitioner access to his own file:

DR. GRUBER: I have requested three items which I requested at the last meeting, which were not sent to me * * *. I have not received the name of the person that reviewed those records, and I have not received the names of the people that have looked at these records so that I don't know who knows what.

DR. LEVERNOIS: Dr. Gruber if you are as astute in law as you will have us believe, you know that the law specifically excludes the possibility of us telling you who is informed, who supplied the reports and who are the investigators or researchers are.

DR. GRUBER: That is completely wrong.

* * *

DR. GRUBER: Then I can make my objections. I quoted you the CRS which we relied upon. It is confidential and shall not be given out to the public, OK? I am a party.

DR. LEVERNOIS: It will not be given out, period.

* * *

DR. GRUBER: I wanted a copy of my file, which I have a right to get.

DR. ULWELLING: Same response.

* * *

DR. GRUBER: So the record will show that I am being refused those items.

DR. LEVERNOIS: Correct. On the basis that we have outlined. Tr. 94-96, emphasis added.

Despite the fact that the Petitioner was never given an opportunity during these "informal interviews" to present any evidence on his own behalf, at the end of the fourth interview the Board issued an order in which it stated that it had reviewed evidence "indicating the possible incompetence" of the Petitioner, and that because

there was therefore "reasonable cause that the licensee may be unable to practice medicine with reasonable skill and safety to patients," the Petitioner was ordered to take the "FLEX examination," pursuant to Or. Rev. Stat. § 677.420(2) (1987). (Ex. 1, 5). The FLEX examination is the written entrance examination required of all new medical practitioners. In this order the Board specifically based its order on Or. Admin. R. 847-10-070 (1987), which provides that failure of this examination shall constitute grounds for suspension or revocation of a license on the ground of "Manifest Incompetency to Practice Medicine" under Or. Rev. Stat. § 677.190(15) (1987).

After this order was issued, the Petitioner requested in writing that the proceedings be converted to a contested case proceeding under Oregon's Administrative Procedures Act [hereinafter "APA"],

but that request was denied. (Ex. 3, 4 & 5). Exhibit 3 is a September 8, 1987, letter from Petitioner's counsel to the Board of Medical Examiners written shortly after the order to take the medical competency examination was issued. That letter states in part:

It was our understanding throughout that this was an informal proceeding. Now the board has apparently deemed it appropriate for Dr. Gruber to take a FLEX examination which, of course, entails considerable expense to Dr. Gruber. Even if he takes the examination and passes it, he has no idea what actions will be taken. Given this muddled procedural course of action, we have no alternative but to request that this matter be converted to a contested case so that Dr. Gruber might obtain fundamental due process with respect to his medical license privileges.

The board responded by letter of September 14, 1987 from its legal counsel (Exhibit 4) which states in part:

The Board's order for a competency examination was pursuant to ORS 677.420(1). ORS 677.420(1) is not a proceeding under ORS 677.190 through

677.208 and does not fall within the definition of a contested case under the APA. This is not a proceeding, at this time, to revoke, suspend or take any disciplinary action against Dr. Gruber's license.

Based upon the above analysis, I have advised the board that Dr. Gruber is not entitled to a contested case proceeding to challenge the board's order.

The Petitioner did not take the examination because he believed the entire process was constitutionally flawed because he had never been given a contested case hearing on the issue of his competency wherein he could present evidence in his own behalf and cross-examine witnesses presenting evidence against him. He also did not want to place his license in complete jeopardy of being revoked if he failed the examination.³

³ This examination, given to all applicants for a medical license, covers all college and medical school subjects, and does not take into account that a
(continued...)

Only after Petitioner's refusal to take this examination did the Board begin a contested case proceeding under the APA. (Ex. 201). However, this proceeding was brought by the Board for the sole purpose of revoking Petitioner's license on the ground that because he refused to take this examination, he had wilfully violated "any provision of [Chapter 677⁴] or any rule adopted by the board." Wilful violation of any provision of Chapter 677 or a rule of the Board is a ground for revocation of a doctor's license under Or. Rev. Stat. § 677.190(18) (1987). Petitioner denied that he wilfully violated a provision of Chapter 677 on the ground that the Board's order

³(...continued)
physician may have specialized over his or her years of practice, and might therefore be less familiar with all subjects.

⁴ The chapter of Oregon Laws providing for the regulation of medicine.

was unlawful and unconstitutional. (Petitioner's Memorandum, pg. 4.)

Petitioner was not allowed to raise the constitutionality or validity of the examination order at that contested case hearing. The only issue allowed to be considered was whether he had refused to take the examination, which he had obviously done. The Board took the position he had waived all constitutional errors in the examination order by failing to commence a Circuit Court action within sixty days under Or. Rev. Stat. § 183.484 (1987).⁵

⁵ However, even if Petitioner had brought such an action, it could not have been resolved by the Circuit Court before the time scheduled for the examination. The statute providing for this process does not give the Circuit Court the power to stay the order while such review is pending. Or. Rev. Stat. § 183.484; App-1 to App-5. Further the Petitioner should not have been required to go to the expense of bringing a separate court proceeding to protect his constitutional rights to a fair hearing by the administrative agency.

At the conclusion of the contested case hearing, the Board concluded that because the Petitioner had refused to take the examination, his license should be revoked. (Ex. 13, pg. 8 & 11; Ex. 12; Ex. 18. July 13, 1988, Order of Board of Medical Examiners, App-18 to App-38.)

Petitioner appealed the revocation order to the Oregon Court of Appeals. After the case was briefed and oral argument was held, the Court of Appeals affirmed the Board's order without writing any opinion. App-38.

Because no opinion was written, it was difficult to determine exactly why the Court of Appeals affirmed the Board's revocation of Petitioner's license to practice medicine. However, from the questions of the Court of Appeals judges at

oral argument⁶, however, it appears reasonable to assume that the Board order was affirmed because the Court of Appeals believed that the Petitioner should have challenged the competency exam order by bringing a Circuit Court action under Or. Rev. Stat. § 183.484 (1987). The Petitioner's position was, however, that the Medical Practices Act [Or. Rev. Stat. Chapter 677] provided a more specific, and therefore controlling, provision in Or. Rev. Stat. § 677.270 (1987), which provides that if the Board wishes to enforce an order it has made, the Board shall apply to Circuit Court. The Petitioner also contended that because the order violated his constitutional right to due process, it was void. (Appellant's Brief, pages 16-17.)

Petitioner then petitioned for review

⁶ The oral arguments of the Court of Appeals are preserved on audio tape.

by the Oregon Supreme Court. On February 22, 1990, review was denied by the Oregon Supreme Court without any opinion. App-39. Petitioner then petitioned for reconsideration,⁷ but this petition was likewise denied without an opinion on April 26, 1990. App-40.

REASONS FOR GRANTING THE WRIT

I. Introduction.

The Board violated Petitioner's due process rights when it concluded that Or. Rev. Stat. § 677.420(1) (1987) and Or. Rev. Stat. § 677.420(2) (1987) allowed it to give a test (which conclusively revokes a

⁷ This petition for reconsideration was based primarily on the newly discovered fact that the 1989 Oregon Legislature, at the request of the Board, had amended several of the provisions of the Medical Practices Act involved in this case to answer several of the very contentions made by the Petitioner and justify positions taken by the Board in this case.

doctor's license if he or she fails to pass it) without providing the due process protections of a contested case. The Oregon appellate courts' affirmance of the Board's action also violated those rights. Such an interpretation of these Oregon statutes is in direct conflict with the Oregon APA and the U.S. Constitution and is therefore invalid.

The Board took the position that Or. Rev. Stat. § 677.420 (1987) allowed it to order any licensee, without a contested case hearing, to take a medical competency examination, either for no reason whatsoever (under subsection 1) or when it found reasonable cause to believe the doctor may be unable to practice medicine with reasonable safety (under subsection 2). Because the Board's own rules provided that failing such a test "shall constitute grounds for suspension or revocation of examinee's

license on the grounds of Manifest Incapacity to Practice Medicine as provided by ORS 677.190(15)" [see App-14], such an interpretation of that statute violates a licensee's constitutionally protected property interest in his license.

While the Board may require an applicant to take such examinations without contested case protections before being issued a license, it cannot require a licensee to do so without those protections, because once the licensee is granted the license, the protected property right exists, and he is entitled to due process before it can be placed in jeopardy. U.S. Const. amend. XIV, § 1 [App-1].

The Board and the Oregon appellate courts further deprived Petitioner of his due process rights by revoking his license for refusing to obey the order to take the competency examination.

The Board of Medical Examiners also refused to follow its own agency rules and the Oregon APA when it failed to give Petitioner a contested case hearing during the "informal" proceedings held during 1986 and 1987.

II. The process violated Oregon law.

Throughout the 1986-87 process Petitioner requested both orally and in writing that he be given a contested case hearing because his license was in direct jeopardy from the process the Board labeled "informal interviews."⁸ Consistent with the

⁸ In the Oregon appellate courts Petitioner contended that Or. Rev. Stat. § 677.415(3) (1987) only provides that the Board may "request an informal interview with the licensee" and that the ordinary meaning of the word "an" in the English language is singular, not plural. Although the Oregon Court of Appeals concluded in a recent case, *Anderson v. Board of Medical Examiners*, 95 Or. App. 676, 770 P.2d 947 (1989), that the word "an" did not limit the Board to one interview, Petitioner nevertheless contended that his rights
(continued...)

United States Constitution, Oregon law provides the right to a contested case hearing when "individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such parties are entitled to appear and be heard." Or. Rev. Stat. § 183.310(2)(a)(A) (1987). Petitioner complied fully with the Board in its requests for documents and patient files during the proceedings the Board labeled "informal interviews." Nonetheless, the Board, in direct contravention of the law, refused to provide Petitioner due process and the right to present evidence.

Again, consistent with the U.S. Con-

⁸(...continued)

under the Oregon APA and the U.S. Constitution prohibited the Board from using multiple "informal" interviews to harass him over a year's time without ever being required to bring formal charges.

stitution, Oregon law provides that a licensee is entitled to a contested case hearing in a proceeding for "the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such hearing." Or. Rev. Stat. § 183.310(2)(a)(C) (1987). In this case the Petitioner continually demanded such a hearing. (Ex. 3, Ex. 5, Ex. 7, Tr. 88-89) As discussed further below, this was, in fact, a proceeding for the suspension or revocation of Petitioner's license.

Finally, Oregon law provides the right to a contested case hearing when an agency "has discretion to suspend or revoke a right or privilege of a person." Or. Rev. Stat. § 183.310 (2)(a)(B) (1987). The Board has the discretion to suspend or revoke a doctor's license. Or. Rev. Stat. § 677.265 (1987); OAR 847-10-070 (1987).

In particular, Or. Rev. Stat. § 677.420(2) (1987) provides in pertinent part:

"(2) If the board has reasonable cause to believe that any licensee is or may be unable to practice medicine * * * with reasonable skill and safety to patients, the board shall cause a competency examination of such licensee for purposes of determining the fitness of the licensee to practice medicine * * *." (Emphasis added)

The Administrative Rules for the Board of Medical Examiners which allow the Board to Administer the FLEX examination, provide that failure to pass this test, whenever given, shall constitute grounds for suspension or revocation for "Manifest Incompetency to Practice Medicine." Or. Admin. R. 847-10-070(2)(3) (1987); Or. Rev. Stat. § 677.190(15) (1987)⁹.

⁹ The 1989 Oregon Legislature enacted this administrative rule by amending Or. Rev. Stat. § 677.190(15) to read:
(continued...)

III. The process violated the U.S. Constitution.

The proceedings which the Board labeled "informal interviews" directly resulted in the Board's determination that there was reasonable cause that Petitioner may be unable to practice medicine with reasonable skill.¹⁰ This determination itself directly put Petitioner's license in

⁹(...continued)

"Manifest incapacity to practice medicine or podiatry including failing a competency examination ordered by the board." (Added language underlined.)

¹⁰ In its order directing petitioner to take the competency examination, the Board referred to Or. Rev. Stat. § 677.420(1) (1987), which appears to allow the Board to order any already licensed doctor to take the FLEX examination at any time, for any reason or no reason at all. However, the text of the order states that it is based on a finding of reasonable cause, which implies that the Board was basing its order on Or. Rev. Stat. § 677.420(2) (1987), which requires the Board to order a medical competency examination when it has reasonable cause to believe that a doctor is incompetent to practice medicine.

jeopardy. Thus the "informal interviews" spanning the period from October 1, 1986 to July 8, 1987 constituted a de facto contested case in which Petitioner was not allowed to present any evidence in his own defense.

Further, the letter sent to Petitioner "inviting" him to attend the second informal interview, held before the Board on October 10, 1986, reminded Petitioner that it had the power to revoke or suspend his license (Or. Rev. Stat. § 677.190(23) (1987)) if he refused this invitation for an informal interview.¹¹ Ex. 104. Therefore it might be argued that even at this

¹¹ See, e.g., *Anderson v. Board of Medical Examiners*, supra n. 8, in which the Oregon Court of Appeals affirmed the Board's revocation of another doctor's license for failure to attend a second informal interview, after the doctor's request that a contested case hearing be convened had likewise been refused by the Board.

early stage Petitioner was entitled to a contested case hearing.

In the October 10, 1986, meeting Petitioner was told that he was asked to see the full Board so that they could tell him of the concerns they had from the first "interview" so he could then have an opportunity to respond. Tr. 63. This opportunity to respond did not satisfy due process requirements, however, in that the Petitioner was not allowed to present his own formal testimony, or to cross-examine witnesses.

At the contested case hearing which was held to determine whether Petitioner wilfully disobeyed the Board's order to submit himself to the FLEX test, the Board took the position that Or. Rev. Stat. § 677.420(2) (1987) did not require a contested case hearing to determine if there was reasonable cause to order a doctor to

take a competency examination. This position resulted in an unconstitutional violation of the Petitioner's procedural due process rights because his license is a protected property interest.

The procedural due process guarantee of the Fourteenth Amendment to the U.S. Constitution applies when a constitutionally protected liberty or property interest is at stake. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). In the instant case the finding of reasonable cause under Or. Rev. Stat. § 677.420(2) (1987) allowed the Board to order the doctor to take an examination which would result in revocation of the doctor's license if failed. Or. Admin. R. § 847-10-070(3). Thus once the Board undertook a process which could result in a determination that a doctor must take the FLEX examination, the doctor is entitled at that time to all of the due process protec-

tions of a contested case. The contested case hearing held after the Board had issued an order for the doctor to take this examination did not protect the doctor's due process rights because at this hearing the Board refused to even consider the question of whether the Board had the right to order Petitioner to take the examination.

The Petitioner does not dispute that Board has the right to investigate a doctor without convening a contested case hearing, but once the Board reached the point where it began the process of determining, under Or. Rev. Stat. § 677.420(2) (1987), whether there was reasonable cause to require the Petitioner to take the FLEX examination, a contested case hearing should have been convened. The U.S. Constitution and Oregon APA both require such a procedure.

As outlined in *Mathews v. Eldridge*,

424 U.S. 319 (1976), a court should analyze whether the timing of a hearing comports with due process, given the exigencies and circumstances of any particular case. The factors to consider include the private interest that will be affected, the risk of an erroneous deprivation of that interest through the procedures used, and the fiscal and administrative burdens that any additional procedural requirements would entail. *Mathews, supra*, 424 U.S. at 335. Here, the private interest that was affected is a 35 year career in medicine. The risk of an erroneous deprivation is great because throughout the proceedings in which the Board found reasonable cause to order a competency examination, Petitioner was not allowed to present any evidence. There were no additional fiscal or administrative burdens in this case, because all that was entailed was that the Board do what its own

rules and the Oregon APA already required.

As the court in *Mathews* stated: "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Mathews*, 424 U.S. at 348, citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, at 171-172 (1951), emphasis added. It is obvious in this case that Petitioner was never given an opportunity to meet the case against him before the property right in his license was placed in serious jeopardy.

Essential fairness is a flexible notion, but at a minimum one must be given an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "An individual must have an opportunity to confront all the evidence against him, in particular that evidence with which the

decisionmaker is familiar." *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 780 (1982). The meaningful time for Petitioner to have been heard was during the 1986-87 proceedings when the Board determined there was reasonable cause to order a competency examination. This was the decision that put his professional license in jeopardy. Petitioner was not allowed to present testimony on his behalf, or even to see the file the Board was keeping on the matter at that time. Since by the Board's own rules if he failed the exam he would be considered incompetent to practice medicine, it was the proceeding ordering the exam that put his property right in jeopardy. Failure to give him a contested case hearing during these proceedings thus violated Petitioner's due process rights.

IV. Conclusion.

This process has a very broad negative

impact on practicing physicians everywhere in the country. Once a physician loses his license by this process, he is placed on the national registry and will be unable to obtain licensure anywhere in the United States. Therefore review of this case is particularly important to protect the property rights of a very large number of physicians in the United States.

For all of these reasons, the Board's conduct in continuing this "informal" process over Petitioner's objections and demands for a contested case hearing was erroneous and a violation of his constitutional and statutory rights, and the revocation of his license should be reversed.

Respectfully submitted,

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APPENDIX

1. U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Or. Rev. Stat. § 183.484 (1987)

Jurisdiction for review of orders other than contested cases; procedure; scope of court authority.

(1) Jurisdiction for judicial review of orders other than contested cases is

conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office.

(2) Petitions for review shall be filed within 60 days only following the date the order is served, or if a petition for reconsideration or rehearing has been filed, then within 60 days only following the date the order denying such petition is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case petition for judicial

review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

(3) The petition shall state the nature of the petitioner's interest, the facts showing how the petitioner is adversely affected or aggrieved by the agency order and the ground or grounds upon which the petitioner contends the order should be reversed or remanded. The review shall proceed and be conducted by the court without a jury.

(4)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(A) Set aside or modify the

order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

(A) Outside the range of discretion delegated to the agency by law;

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

(C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reason-

able person to make that finding.

(5) In the case of reversal the court shall make special findings of fact based upon the evidence in the record and conclusions of law indicating clearly all aspects in which the agency's order is erroneous.

3. Or. Rev. Stat. § 677.190 (1987)

Grounds for suspending, revoking or refusing to grant license, registration or certification. The board may refuse to grant, or may suspend or revoke a license to practice medicine or podiatry in this state, or may refuse to grant, or may suspend or revoke the registration or certification of any other person registered, certified or otherwise controlled by the board for any of the following reasons:

(1) Unprofessional or dishonorable conduct.

(2) Employing any person to solicit

patients for the licensee.

(3) Representing to a patient that a manifestly incurable condition of sickness, disease or injury can be cured.

(4) Obtaining any fee by fraud or misrepresentation.

(5) Wilfully or negligently divulging a professional secret.

(6) Conviction of any offense punishable by incarceration in a Department of Corrections institution or in a federal prison, subject to ORS 670.280. A copy of the record of conviction, certified to by the clerk of the court entering the conviction, shall be conclusive evidence.

(7) Habitual or excessive use of intoxicants, drugs or controlled substances.

(8) Fraud or misrepresentation in applying for or procuring a license to practice in this state, or in connection

with applying for or procuring registration.

(9) Making false or misleading statements regarding skill or the efficacy or value of the medicine, treatment or remedy prescribed or administered by the licensee or at the direction of the licensee in the treatment of any disease or other condition of the human body or mind.

(10) Impersonating another person licensed to practice medicine or podiatry or permitting or allowing any person to use the license or certificate of registration.

(11) Aiding or abetting the practice of medicine or podiatry by a person not licensed by the board.

(12) Using the name of the licensee under the designation "doctor," "Dr.," "D.O." or "M.D.," "D.P.M.," "Acupuncturist," "E.M.T. II, III or IV," "P.A." or any similar designation with reference to the

commercial exploitation of any goods, wares or merchandise.

(13) Insanity or mental disease as evidenced by an adjudication or by voluntary commitment to an institution for the treatment of a mental disease, or as determined by an examination conducted by three impartial psychiatrists retained by the board.

(14) Gross negligence or repeated negligence in the practice of medicine or podiatry.

(15) Manifest incapacity to practice medicine or podiatry.

(16) The suspension or revocation by another state of a license to practice medicine or podiatry, based upon acts by the licensee similar to acts described in this section. A certified copy of the record of suspension or revocation of the state making such suspension or revocation

is conclusive evidence thereof.

(17) Failing to designate the degree appearing on the license under circumstances described in ORS 677.184(3).

(18) Wilfully violating any provision of this chapter or any rule adopted by the board.

(19) Failing to report the change of the location of practice of the licensee as required by ORS 677.170.

(20) Adjudication of or admission to a hospital for mental illness or imprisonment as provided in ORS 677.225.

(21) Making a fraudulent claim.

(22)(a) Performing psychosurgery.

(b) For purposes of this subsection and ORS 426.385, "psychosurgery" means any operation designed to produce an irreversible lesion or destroy brain tissue for the primary purpose of altering the thoughts, emotions or behavior of a human

being. "Psychosurgery" does not include procedures which may produce an irreversible lesion or destroy brain tissues when undertaken to cure well-defined disease states such as brain tumor, epileptic foci and certain chronic pain syndromes.

(23) Refusing an invitation for an informal interview with the board requested under ORS 677.415.

(24) Violation of Federal Controlled Substance Act.

(25) Prescribing controlled substances without a legitimate medical purpose and without following accepted procedures for examination of patients and record keeping.

4. Or. Rev. Stat. § 677.270 (1987)

Proceedings upon refusal to testify or failure to obey rule, order of subpoena of Board. If any licensee fails to comply with any lawful rule or order of the Board,

or fails to obey any subpoena issued by the Board, or refuses to testify concerning any matter on which the licensee may lawfully be interrogated by the Board, the Board may apply to any circuit court of this state, or the judge thereof, to compel obedience. The court or judge, upon such application, shall institute proceedings for contempt.

5. Or. Rev. Stat. § 677.415 (1987)

Investigation of incompetence; reports to board; informal interview. (1) The board on its own motion may investigate any evidence which appears to show that a licensee licensed by the board is or may be medically incompetent or is or may be guilty of unprofessional or dishonorable conduct or is or may be mentally or physically unable safely to engage in the practice of medicine or podiatry.

(2) Any health care facility licensed

under ORS 441.015 to 441.087 and 441.820, any licensee licensed by the board, the Oregon Medical Association, Inc., or any component society thereof, the Osteopathic Physicians and Surgeons of Oregon, Inc. or the Oregon Podiatric Medical Association shall, and any other person may, report to the board any information such licensee, association, society or person may have which appears to show that a licensee is or may be medically incompetent or is or may be guilty of unprofessional or dishonorable conduct or is or may be mentally or physically unable safely to engage in the practice of medicine or podiatry.

(3) If in the opinion of the board it appears such information provided to it under provisions of this section is or may be true, the board may request an informal interview with the licensee.

6. Or. Rev. Stat. § 677.420 (1987)

Competency examination; investigation;
consent by licensee; assistance. (1)

Notwithstanding any other provisions of this chapter, the board may at any time direct and order a mental, physical or medical competency examination or any combination thereof, and make such investigation, including the taking of depositions or otherwise in order to fully inform itself with respect to the performance or conduct of a licensee.

(2) If the board has reasonable cause to believe that any licensee is or may be unable to practice medicine or podiatry with reasonable skill and safety to patients, the board shall cause a competency examination of such licensee for purposes of determining the fitness of the licensee to practice medicine or podiatry with reasonable skill and safety to patients.

(3) Any licensee by practicing or by filing a registration to practice medicine or podiatry shall be deemed to have given consent to submit to mental or physical examination when so directed by the board and, further, to have waived all objection to the admissibility of information derived from such mental or physical or medical competency examination on the grounds of privileged communication.

(4) The board may request the Oregon Medical Association, Inc., Oregon Osteopathic Association or the Oregon Podiatry Association or any of them to assist the board in preparing for or conducting any medical competency examination as the board may deem appropriate.

7. Or. Admin. R. 847-10-070 (1987)

(1) Whenever the Board of Medical Examiners orders a medical competency

examination pursuant to ORS 677.420, it may administer one, all, or any combination of the following examinations:

- (a) FLEX Components 1 and 2;
- (b) Oral Examination;
- (c) Any other examination that the Board determines appropriate.

(2) When administering FLEX Components 1 and 2, an oral examination, or any examination determined appropriate by the Board, the Board shall require a passing grade of 75.

(3) Failure to achieve a passing grade on any examination shall constitute grounds for suspension or revocation of examinee's license on the grounds of Manifest Incapacity to Practice Medicine as provided by ORS 677.190(15).

(4) If an oral examination is ordered by the Board, an Examination Panel shall be appointed. The examination shall include

questions which test basic knowledge and also test for knowledge expected of a physician with a practice similar in nature to examinee's. The panel shall establish a system for weighing their score for each question in the examination. After it is prepared, the examination shall be submitted to the Board for review and approval.

(5) Appointment of an Examination Panel is required only when administering an oral examination.

(6) The examinee shall be given no less than two weeks' notice of the date, time and place of any examination to be administered.

8. August 10, 1987 Order of Board of Medical Examiners

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF OREGON

In the Matter of:

MATTHEW GRUBER, M.D.

ORDER FOR COMPETENCY EXAMINATION

Evidence indicating the possible incompetence of MATTHEW GRUBER, M.D., to practice medicine having been thoroughly reviewed by the full Board at their meeting on the 8th day of July, 1987, and the Board having reasonable cause that the license may be unable to practice medicine with reasonable skill and safety to patients, the Board of Medical Examiners under the provisions of ORS 677.420(1) and Oregon Administrative Rule 847-10-070, does make the following order:

I.

That MATTHEW GRUBER, M.D., is hereby ordered to take FLEX Component I and II on the 1st, 2nd and 3rd days of December, 1987.

Dated at Portland, Oregon this 10th day of August, 1987.

Earle LeVernois, M.D., Chairman
Board of Medical Examiners

9. July 13, 1988 Order of Board of Medical
Examiners

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF OREGON

In the Matter of:

MATTHEW GRUBER, M.D.

ORDER ADOPTING HEARINGS OFFICER'S
PROPOSED FINDINGS OF FACT
CONCLUSIONS OF LAW, ORDER AND OPINION

The Board, having reviewed the attached Hearings Officer's Proposed Findings of Fact, Conclusions of Law, Order and Opinion (Exhibit A) and each Board member having fully [sic] considered said Proposed Findings and Order, Transcript of Proceeding and exhibits of the March 16, 1988, and having fully considered licensee's written exceptions to the Hearings Officer's Proposed Findings has, by unanimous vote, on

Wednesday, July 13, 1988, adopted and incorporated here the said "Exhibit A" as the Findings of Fact, Conclusions of Law, Order and Opinion of the Board.

IT IS THEREFORE ORDERED THAT the license to practice medicine in Oregon of Matthew Gruber, M.D., is revoked, effective August 15, 1988.

Dated this 13th day of July, 1988.

Anthony J. Cortese, D.O., Chairman
Board of Medical Examiners

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the service this Order. Judicial review is pursuant to the provisions of ORS 183.482.

EXHIBIT A

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF OREGON

In the Matter of:

App-19

MATTHEW GRUBER, M.D.

PROPOSED FINDINGS OF FACT
CONCLUSIONS OF LAW, ORDER AND OPINION

This matter came on for contested case hearing before the undersigned Hearing Office of the above-entitled Board on March 16, 1988, at Portland, Oregon. The Board was represented by Walter L. Barrie, Assistant Attorney General. The Licensee, Matthew Gruber, M.D., appeared in person and by his attorney, William D. Brandt. Testimony was presented, exhibits were received in evidence, and arguments were made. The Licensee agreed to file a memorandum by March 31, 1988, and the Board agreed to file an answering memorandum ten days thereafter.

On March 29, 1988, the Licensee filed a petition for "reconsideration and rehearing with respect to the Board's Order issued on July 8, 1987" and further "re-

quest[ed] contested case status." A memorandum was submitted by the Licensee in support of the petition. The Board filed a reply memorandum.

The issue presented by the complaint is whether the Licensee's failure to comply with the order to take a competency examination is a ground for disciplinary action. The petition and the arguments made in the accompanying memorandum raise the following issues:

(1) Does the Board have jurisdiction of the subject matter of this proceeding?

(2) Is a "petition for reconsideration and rehearing" provided for by statute where an order requiring a competency examination has been issued?

(3) Is the Licensee's petition timely?

(4) Is the order of the Board subject to reconsideration in this proceeding?

(5) If the order is subject to review:

(a) Did the Board have jurisdiction to issue an order requiring a competency examination?

(b) Was the Board required to conduct its informal interviews with the Licensee as contested case hearings?

(c) Did Dr. Drips have a potential conflict of interest because:

(i) One of the partners of Dr. Drips sat on a committee of a hospital which reviewed evidence and made findings which led to the Licensee's loss of staff privileges at that hospital; or,

(ii) Dr. Drips is on the staff of that hospital and the Licensee has filed a lawsuit against the hospital which is pending?

(d) Was the presence of the public member at each informal interview a

requisite to the validity of the Board's order?

(e) Was the Board required to give Licensee a description of the appeal process from the order of the Board?

(f) If the Board was required to so notify the Licensee, did the Board's failure to notify affect the substantial rights of the Licensee?

(6) When a licensee fails to comply with a lawful order of the Board is the Board's right to apply to Circuit Court to compel obedience (ORS 677.270) its exclusive remedy?

The following proposed findings of fact, conclusions of law and order are based upon review of the entire record.

FINDINGS OF FACT

1.

Matthew Gruber, M.D. is a physician licensed to practice medicine in the State

of Oregon. Prior to commencement of the Board's investigation of the Licensee he was a member of the staff of Salem Hospital.

2.

At all times mentioned herein, William E. Drips, M.D. was a licensed physician, was a member of the staff of Salem Hospital, was a member of the Board, and was the Chairman of its Investigative Committee.

3.

Beginning in 1984 the Licensee became the subject of an investigation by the medical staff of Salem Hospital. Steven P. Rogosin, M.D., a partner of Dr. Drips, sat on a committee of the medical of the hospital which reviewed evidence and made findings which led to the Licensee's loss of staff privileges at the hospital.

4.

Dr. Drips did not participate in the

investigation or actions which led to the Licensee's loss of staff privileges. He had no ex parte contact with Dr. Rogosin about the Licensee.

5.

Subsequent to the loss of his staff privileges Licensee filed a lawsuit against Salem Hospital and various members of its staff and administration. Dr. Drips is not a named defendant in that lawsuit. The lawsuit was pending at all times during the Board's investigation and when it issued its order.

6.

In 1986 and 1987 the Board conducted an investigation of the Licensee. The Board subpoenaed and reviewed the records of several of the Licensee's patients.

7.

The Licensee appeared for informal interviews before the Investigative Commit-

tee of the Board on October 1, 1986 and the full Board on October 10, 1986. The public member of the Board was a member of the Investigative Committee and was not present at either interview.

8.

The Licensee appeared for informal interviews before the Investigative Committee of the Board on May 6, 1987 and the full Board on July 8, 1987. The public was present at both interviews.

9.

The Licensee objected at each interview to presence and participation of Dr. Drips. At the informal interview before the Investigative Committee on May 6, 1987 the Licensee requested a statement of the matters charged and objected because he was unable to obtain the reports which the Board was considering in its investigation. Prior to the informal interview on July 8,

1987 the Licensee requested the names of the physicians who had reviewed his records.

1.

By order dated August 10, 1987, and served August 13, 1987, the Board ordered the Licensee to take a competency examination on December 1 through 3, 1987.

2.

By letter dated September 8, 1987, counsel for the Licensee requested "that this matter be converted to a contested case." He also stated that the letter should be considered "our formal notice of appeal." By letter dated September 14, 1987 counsel for the Board advised the Licensee of its position that the order was not a proceeding which is "within the definition of a contested case." By letter dated September 24, 1987 the Licensee stated:

In order to convert this process to a "disputed case" in which I may bring witnesses on my behalf and continue to court action if necessary it is my intention not to take the FLEX exam as ordered.

* * *

My attorney will file appropriate papers concerning the Order of the Board.

3.

By letter dated November 17, 1987 the Licensee reiterated his intent not to take the competency examination.

4.

The Licensee did not take the competency examination on the scheduled date. The Licensee did not file a petition for judicial review of the order. The Licensee's petition for reconsideration and rehearing was filed more than sixty days (approximately 6-1/2 months) after service of the order.

ULTIMATE FINDINGS OF FACT

The Licensee wilfully failed to comply

with the order to take a competency examination.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of this proceeding. A valid order was entered by the Board (Conclusion of Law 4(b)). Failure to comply with an order of the Board is a ground for discipline. ORS 677.190(18) provides that "[w]ilfully violating any provision of this chapter or any rule adopted by the board" is a ground for discipline. A violation of a valid order to take a competency examination is a violation of ORS 677.420 and of a rule adopted by the Board. The Board has jurisdiction to conduct a disciplinary proceeding (ORS 677.200) and to discipline a licensee (ORS 677.205).

2. A petition for reconsideration and rehearing is a pleading which is available to the Licensee. The informal interviews

were not contested case hearings (Conclusion of Law 4(c), *infra.*) Judicial review of the order which resulted from the investigation is provided for in ORS 183.484. Subparagraph 2 thereof provides that a petitioner may file a petition for reconsideration or rehearing.

3. The Licensee's petition for reconsideration and rehearing was not timely. MR 137-03-080(1) (adopted by the Board pursuant to OAR 847-01-005) provides that a petition for reconsideration or rehearing of a final order may be filed within sixty days after the order is served. While MR 137-03-080(1) as drafted applies only to ORS 183.482, the provisions of ORS 183.482(1) and 183.484(1) are substantially the same. The sixty day limitation for filing a petition for reconsideration found in MR 137-03-080(1) is reasonable, should apply, and hereby is construed to apply

also to orders in other than contested cases. The Board's order became final on August 13, 1987 [sic], sixty days after service (ORS 183.484(1)). The petition was filed on March 29, 1988 and thus was not timely. The Board's order is not the subject of reconsideration or rehearing in this proceeding.

4. If the order of the Board is to be reconsidered, the Board had jurisdiction to issue such an order and the order is valid.

(a) The Board has jurisdiction to issue an order requiring a licensee to take a competency examination. The Board is authorized to require a licensee to submit to a medical competency examination "[n]otwithstanding any other provisions of this chapter * * * at any time * * *." ORS 677.420(1). In addition, the Board is authorized to require a licensee to submit to a competency examination if it "has

reasonable cause to believe that [a] licensee is or may be unable to practice medicine * * * with reasonable skill and safety to patients * * *." ORS 677.420(2).

(b) The order of the Board is valid. The order recites that the Board has "reasonable cause [to believe] that the licensee may be unable to practice medicine with reasonable skill and safety to patients." Accordingly, the order is based upon a finding which supports the order. ORS 677.420(2).

(c) The Board was not required to conduct its informal interviews with the licensee as contested case hearings. The Board is authorized to investigate evidence which "appears to show that a licensee * * * is or may be medically incompetent * * *." ORS 677.415(1). The Board is authorized to request an informal interview with the licensee if in its opinion the

investigation discloses that it is or may be true that the licensee is medically incompetent. ORS 677.415(3).

An informal interview is not a "proceeding for suspension or revocation of a license" (ORS 677.200, 677.208), is not a proceeding "[w]here the board proposes to refuse to issue a license, or refused to restore an inactive registrant to an active registration" (ORS 677.208(1)), and is not a "contested case" as defined in ORS 183.310(2). Accordingly, an informal interview is not subject to the requirements of a contested case hearing. (ORS 183.413 through 183.470.) The License was not entitled to a "statement of charges" or complaint at the informal interviews since there were no charges pending at those times. The contents of the Board's investigative file are confidential (ORS 677.425(1)), and are exempt from disclosure

under the Public Records Law. See ORS 192.502(8). For a discussion of a licensee's right in a contested case to obtain by discovery the evidence upon which the Board intends to rely and a list of the Board's witnesses, see Spray v. Bd. of Medical Examiners, 50 Or App 311, 329-330 (1981).

(d) Dr. Drips did not have a potential conflict of interest. ORS 244.020(5). There is no evidence that any action of the Board with respect to Licensee would be to the private pecuniary benefit or detriment of Dr. Drips, or to his partnership.

(e) The presence of the public member at each informal interview was not a requisite to the validity of the Board's order. Substantial compliance with the requirements of ORS 677.235(1) was achieved by the following: the public member was a

member of the Investigative Committee; she participated in the informal interview before the full Board on July 8, 1987; and, she participated in the "thorough review by the full Board" at its meeting on July 8, 1987.

(f) The Board was not required to give the Licensee a description of the appeal process from the order. The order is not subject to the requirements imposed upon an order in a contested case (Conclusions 2, 4(c), supra) and thus ORS 183.413(2)(i) does not apply.

(g) If the Board was required to give the Licensee notice of the appeal process the Board's failure did not affect the substantial rights of the Licensee. During a substantial portion of the period while the time for filing an appeal was running, the Licensee was represented by counsel. The Board, during that period,

notified the Licensee and his counsel of its position that the proceeding was not a contested case. The time for filing an appeal from an order in other than a contested case is sixty days, the same as from an order in a contested case. The Licensee, in writing and while the time for appeal was running, acknowledge his awareness that the order had been entered and of the Board's position that it was an order other than in a contested case. The Licensee and his counsel were charged with constructive knowledge of the Licensee's appeal rights.

(5) The Board's right under ORS 677.270 to apply to Circuit Court to compel obedience (See ORS 33.010 through 33.150) is not its exclusive remedy. The Board has the option to file a complaint alleging a violation of ORS 677.190(18) and proceed to a contested case hearing, which is the

procedure which has been followed herein.

(6) The Licensee wilfully failed to comply with the order. On at least occasions the Licensee, in writing, notified the Board that he would not take the competency examination. The Licensee knew the contents of the order and chose to intentionally and knowingly disobey the order. The Licensee's conduct was wilful. See Emery v. Portland Typewriter & Office Machine, 86 Or App 635, 638 (1987). Compare ORS 654.991, 646.605, 618.501. The Licensee is guilty of a violation of ORS 677.190(18) and is subject to disciplinary action provided for in ORS 677.205.

ORDER

It is hereby ordered that:

(1)

Licensee's petition for rehearing and consideration, including his request for "contested case status," is denied.

(2)

The license of Matthew Gruber, M.D. to practice medicine in the State of Oregon is revoked.

Dated this 27 day of April, 1988:

By David C. Landis, Hearing Officer

10. August 16, 1989 Opinion of Oregon
Court of Appeals

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

MATTHEW GRUBER,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF
OREGON,

Respondent.

No. CA A49350

Appeal or judicial review from: Board of
Medical Examiners.

Date argued or submitted on briefs: July
31, 1989

Before: Richardson, Presiding Judge,
Joseph, Chief Judge, and Newman, Judge
Attorney for Petitioner: Clayton C. Pat-
rick, Salem; Attorney for Respondent:
Janet N. Billups, Portland.
Affirmed without opinion. Date filed:
August 16, 1989.

11. February 22, 1990 Order of Oregon
Supreme Court Denying Review

IN THE SUPREME COURT OF THE STATE OF OREGON

GRUBER, MATTHEW,
Petitioner,

v.

BOARD OF MEDICAL EXAMINERS,
Respondent.

CA A49350
SC S36761

ORDER DENYING REVIEW

The Court has considered the petition for
review and ORDERS that it be denied.

DATE: February 22, 1990

Edwin J. Peterson,
Chief Justice

Carson, J., not participating.

12. April 26, 1990 Order of Oregon Supreme
Court Denying Reconsideration

IN THE SUPREME COURT OF THE STATE OF OREGON

MATTHEW GRUBER,

Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF
OREGON,

Respondent.

CA A49350
SC S36761

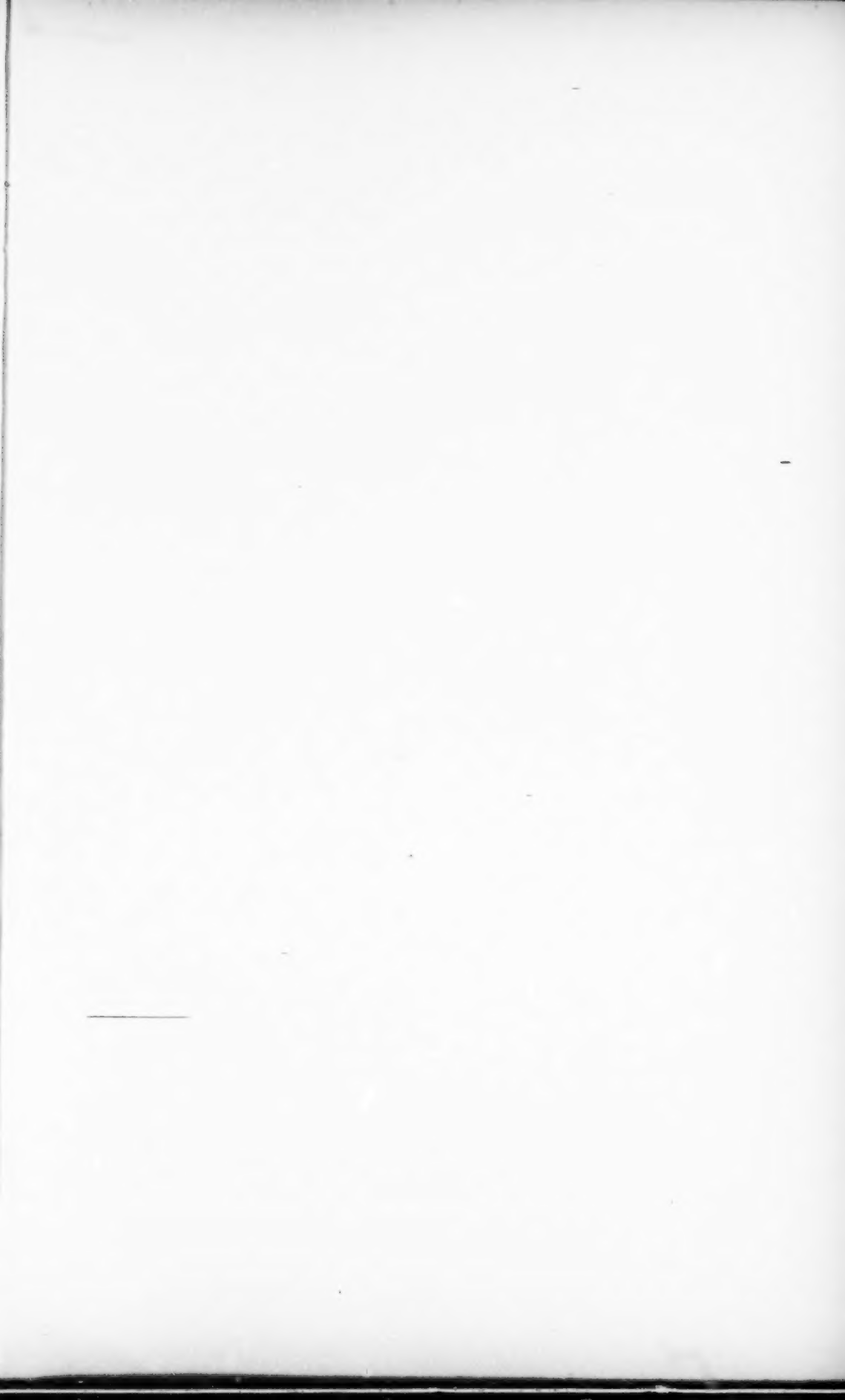
ORDER DENYING RECONSIDERATION

The Court has considered the petition
for reconsideration and ORDERS that it be
denied.

DATED: April 26, 1990

Edwin J. Peterson
Chief Justice

Carson, J. not participating.



(2)

No. 90-291

Supreme Court, U.S.
FILED
OCT 22 1990

F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MATTHEW GRUBER,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Respondent rejects petitioner's statement of the questions presented, and submits the following in their place.

1. Where petitioner declined to seek available state court judicial review of respondent's order directing him to take a competency examination, and that order became final and unreviewable under state law, may petitioner challenge the constitutionality of the procedures leading up to that order after his license to practice medicine in Oregon was revoked, following a formal hearing, for wilful refusal to comply with the order to take the competency examination?

2. Did respondent's order directing petitioner to take a competency examination deprive petitioner of a liberty or property interest, thus requiring respondent to grant petitioner procedural protections under the Due Process Clause?

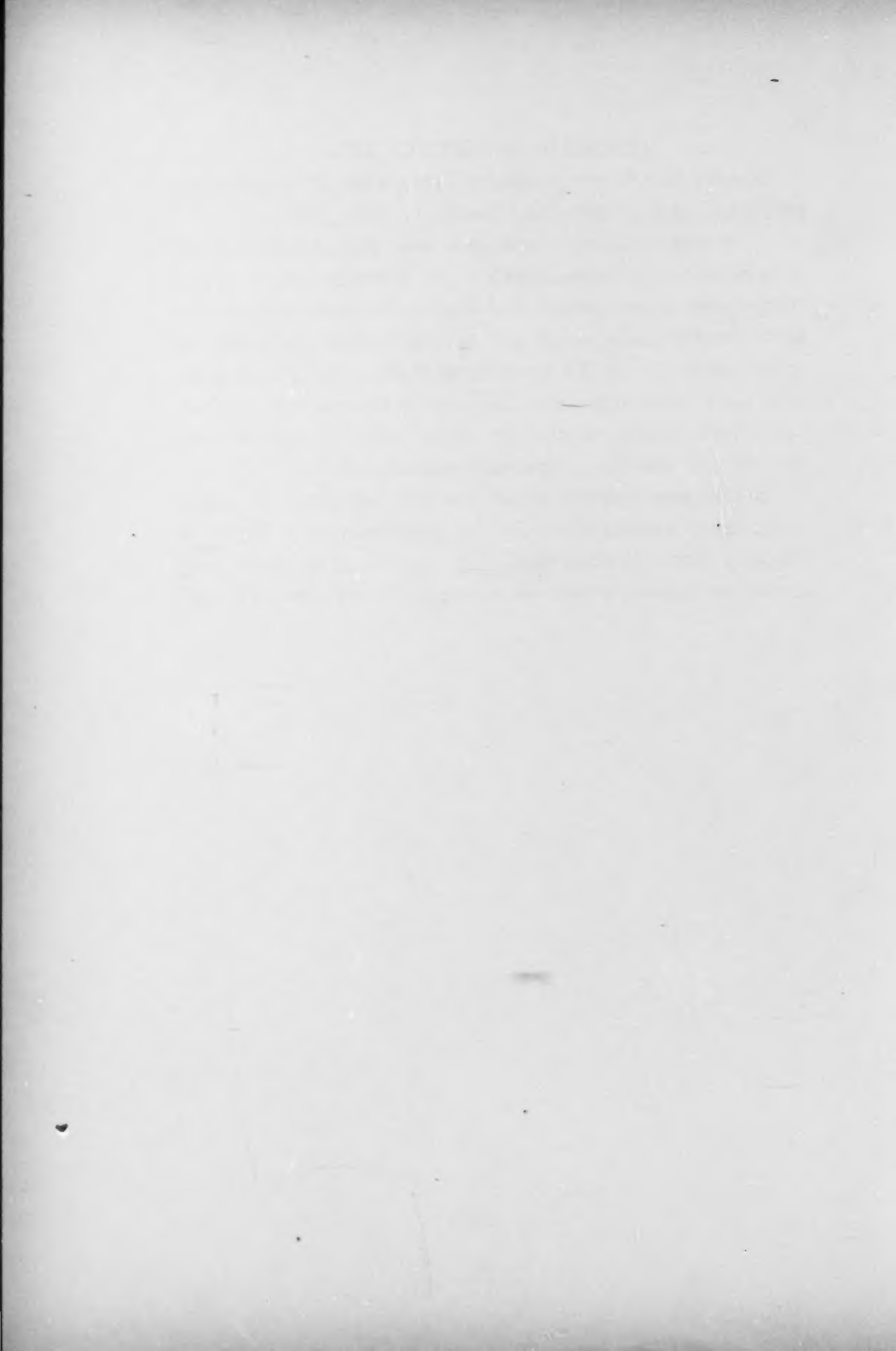


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OPINIONS BELOW

Respondent accepts petitioner's statement, except to point out that the Oregon appellate courts' actions in this case appear at *Gruber v. Board of Medical Examiners of the State of Oregon*, 98 Or. App. 55, 778 P.2d 516 (1989), review denied 309 Or. 334, 787 P.2d 888 (1990).

STATEMENT OF JURISDICTION

Respondent accepts petitioner's statement.

STATEMENT OF THE CASE

Respondent submits the following supplemental statement of the case.

Following the death of one of petitioner's patients in 1984, physicians at Salem Hospital, where petitioner had staff privileges, questioned petitioner's continued competency to practice medicine at the hospital. Tr. 6, 43, 49. The Salem Hospital medical board reviewed petitioner's medical practice and revoked petitioner's hospital privileges. Tr. 63.

Pursuant to the mandate of Or. Rev. Stat. §§ 441.820 and 677.415(2), Salem Hospital reported this action to respondent, the Board of Medical Examiners of the State of Oregon (hereinafter the Board). The Board then undertook an independent, informal investigation under Or. Rev. Stat. § 677.415(3) to determine whether there was a problem regarding petitioner's competency to practice medicine in Oregon. Tr. 22, 57.

An investigative subcommittee of the Board met with petitioner on October 1, 1986, to discuss several of the patient cases that were reviewed at Salem Hospital. Tr. 1-61. The full Board met with petitioner on October 10, 1986, for the same purpose. Tr. 62-84. These and all other meetings were recorded, and petitioner was allowed to bring an attorney. Tr. 1, 63, 86, 92. Petitioner has a law degree, but has not passed the bar exam. Tr. 142, 143.

After the first informal meetings, the Board randomly selected several of petitioner's patient records to be reviewed as part of the investigative process. Tr. 86. Petitioner was informed that the reviewer's name was confidential at that stage of the investigation, but would be provided to him if the reviewer's conclusions or report became the basis for taking disciplinary action. Tr. 95. After receiving the reviewer's report, the investigative committee (May 6, 1987) and the Board (July 8, 1987) met with petitioner again in an informal investigative capacity. Tr. 86, 91.

On August 10, 1987, the Board, finding reasonable cause to believe that petitioner may be unable to practice medicine with reasonable skill and safety to patients, ordered petitioner to take a FLEX competency examination. Ex. 1. That order was served on petitioner August 13, 1987. The examination was scheduled for December 1-3, 1987. Ex. 2. By letters of September 24, 1987 (Ex. 5) and November 17, 1987 (Ex. 7), petitioner informed the Board of his intent not to take the examination. Among the reasons he gave was his desire that the Board "convert" the matter to a contested case hearing. Tr. 139; Ex. 5, 7. The Board told petitioner that the competency exam as well as the interviews were part of the investigative process and did not constitute Board disciplinary action to revoke or otherwise affect petitioner's license. Tr. 2, 64, 86, 92; Ex. 4. For these reasons, the Board informed petitioner that the proceedings did not require a contested case hearing. Ex. 4.

The Board's order to take the competency examination was subject to judicial review under Or. Rev. Stat. § 183.484(1) as an "order[] [in] other than [a] contested case[]." The deadline for filing a petition for judicial review was October 12, 1987, 60 days after the date the order was served. Or. Rev. Stat. § 183.484(2). On September 24, 1987, petitioner notified the Board that his attorney would file the "appropriate

papers." Tr. 141; Ex. 5. However, neither petitioner nor his attorney filed a petition for judicial review.

Petitioner ultimately refused to take the examination. Consequently, the Board, acting pursuant to Or. Rev. Stat. § 677.420 and Or. Admin. R. 247-10-070, decided to take disciplinary action against the petitioner for his refusal to comply with the Board's order. On February 2, 1988, the Board informed petitioner of the grounds for the proposed disciplinary action, and the potential sanction. The Board's letter also informed petitioner of the date, time and place of the scheduled hearing on the matter, and was accompanied by a notice of the "Bill of Rights" under Oregon's Administrative Procedure Act. Ex. 201. A contested case hearing on that matter was held as scheduled on March 16, 1988, before an independent hearing officer. At this hearing, petitioner introduced transcripts of the informal interviews. Tr. 128, 129.

After this hearing, the hearing officer prepared his Proposed Findings of Fact, Conclusions of Law, Order and Opinion. The Board, reviewing the entire record and petitioner's written exceptions to the proposed order, adopted that proposed order in its entirety. The Board ruled, *inter alia*, that petitioner could not challenge the prior order to take a competency examination, because he failed to seek available judicial review of that order within the time set by Or. Rev. Stat. § 183.484. The Board also found that petitioner wilfully refused to comply with the Board's order. That refusal is a ground for revocation of a license to practice medicine in Oregon. Or. Rev. Stat. § 677.190(18). On that basis, the Board revoked petitioner's license to practice medicine in Oregon.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. Petitioner's Challenges to the Procedures Underlying the Board's Order to Take the Competency Examination are not Properly Before this Court.

Petitioner has offered three questions for resolution by this Court. The first question concerns the procedures leading up to the Board's August 10, 1987, order to petitioner to take a competency examination. The second and third questions concern the Oregon statutes that empower the Board to order licensed physicians to take a medical competency examination. Petitioner contends that the Board denied him due process by ordering him to take a competency examination without first affording him a "due process hearing." He also argues that the Board has unconstitutionally interpreted its enabling statutes to permit it to order a physician to take a competency examination without first granting a hearing.

None of these questions is properly before this Court. As explained below, the Board's August 10, 1987, order to petitioner to take a competency examination was subject to judicial review in state court. When petitioner failed to seek judicial review before the filing deadline, that order became final and not open to collateral attack.

Under Oregon's Administrative Procedure Act (APA), Or. Rev. Stat. §§ 183.310 to 183.550, that order was an order in other than a contested case. Petitioner could have sought judicial review of that order by filing a petition for judicial review in the appropriate state circuit court within 60 days from the date the order was served: that is, by October 12, 1987. *See* Or. Rev. Stat. § 183.484(1), (2). On judicial review, the order would have been subject to attack on a wide variety of grounds: that the agency erroneously interpreted a provision of law and that a correct interpretation requires a particular action, Or. Rev. Stat. § 183.484(4)(a); that the agency's

exercise of discretion was outside of the range of discretion delegated to the agency by law, Or. Rev. Stat. § 183.484(4)(b); and that the order is not supported by substantial evidence in the record, Or. Rev. Stat. § 184.484(4)(c).

The record shows that petitioner and his attorney were aware of the appealability of the Board's order to take the competency examination. Yet petitioner failed to file a timely (or any) petition for judicial review of that order. When the 60-day filing deadline passed, that order became final and immune from collateral attack. See, e.g., *Ellis v. Roberts*, 302 Or. 6, 18, 725 P.2d 886 (1986) (right to challenge order in other than contested case expires after 60 days); *Clarke Electric, Inc. v. State Highway Division*, 93 Or. App. 693, 697, 763 P.2d 1199 (1988) (plaintiff's tort claim challenging state's award of contract to another bidder barred because the award was reviewable under Or. Rev. Stat. § 183.484 and plaintiff failed to comply with time limitations for judicial review); *Mongelli v. Oregon Life and Health Guaranty*, 85 Or. App. 518, 522, 737 P.2d 633 (1987) (Oregon APA statutes governing judicial review provide sole and exclusive methods of obtaining judicial review of orders covered by that Act). As noted above, it was on this ground that the Board, in the hearing on the revocation of petitioner's license, refused to consider petitioner's challenges to the Board's earlier order directing petitioner to take a competency examination. The Board's refusal was correct.

Petitioner also had an additional avenue for judicial review under state law. During the proceedings prior to the Board's issuance of its August 10, 1987, order, petitioner could have sought interlocutory judicial review under Or. Rev. Stat. § 183.480(3). This statute permits a person to obtain interlocutory judicial review of agency action

upon showing that the agency is proceeding without probable cause, or that the party will suffer substantial

and irreparable harm if interlocutory relief is not granted.

See, e.g., *Lane Council Govts v. Emp. Assn.*, 277 Or. 631, 638, 561 P.2d 1012 (1977) (applying statute); *Mongelli v. Oregon Life and Health Guaranty*, *supra*, 85 Or. App. at 524-25 (same). Petitioner also passed up this method of obtaining judicial review.

Thus, petitioner's attack on the Board's order directing him to take a competency examination is barred under state law because of his failure to seek available judicial review of that order within the deadlines set by Oregon's APA. He has not suggested, nor could he reasonably suggest, that the 60-day time limit for filing a petition for judicial review was constitutionally insufficient.

Petitioner asserts, without support, that on judicial review under Or. Rev. Stat. § 183.484, the circuit court could not have resolved the matter before the time scheduled for the examination. Petition at 16 n. 5. Over three and one-half months elapsed between August 13, 1987 (the date the order was served) and December 1, 1987 (the date on which the test was scheduled to begin). There is not a shred of evidence in this record to suggest that, had petitioner filed a timely petition for judicial review, the circuit court could not have resolved the matter before the scheduled test. By his own inaction petitioner deprived himself of the chance to obtain judicial relief.

For these reasons, the issues petitioner seeks to raise in this Court are not properly presented in the current posture of this case.

II. Petitioner's Assertion that the Procedures Before the Board Violated Oregon Law does not Warrant this Court's Discretionary Review.

In part II of his petition, pages 22-25, petitioner argues that the Board, in failing to provide a "contested case" hearing before ordering petitioner to take a competency examination,

violated Oregon law. As explained above, petitioner is precluded from raising that issue under Oregon law because of his failure to seek judicial review of the order within the 60 days provided by Oregon's APA. In any event, even if petitioner were not so barred, that question of the interpretation and application of state law does not justify this Court's discretionary review.

Even if petitioner were correct in his analysis of Oregon law, that would not aid him here. Under Oregon law, the determination whether an administrative proceeding is a "contested case" requiring the APA's procedural protections depends not on the procedures actually followed by the agency, but on the procedures that should have been followed. *Patton v. St. Bd. Higher Ed.*, 293 Or. 363, 366, 647 P.2d 931 (1982). If petitioner were correct that the Board should have provided him a "contested case" before ordering him to take a competency examination, then the order was an order in a contested case. *See id.* A person seeking judicial review of an order in a contested case must file a petition for judicial review in the Oregon Court of Appeals within 60 days of the date the order was served. Or. Rev. Stat. § 183.482(1). Petitioner failed to do so. Accordingly, and for the reasons stated in Part I above, even under petitioner's theory he is barred under Oregon law from seeking judicial review of that order. The state law issue he seeks to raise in this Court, therefore, is not properly presented.

III. Petitioner's Due Process Claims do not Warrant this Court's Discretionary Review.

In part III of his petition, pages 26-34, petitioner contends that the Board, in failing to provide a hearing before ordering petitioner to take a competency examination, denied him due process. Petitioner merely argues that the Board's actions were inconsistent with settled principles established by this Court under the Due Process Clause. He fails to explain why,

even if his argument were accepted, the Oregon courts' resolution of this matter is of such significance that it merits this Court's discretionary review.

In particular, petitioner does not suggest that the type of problem he alleges is widespread and requires resolution by this Court. Respondent's research has uncovered only one other case involving the precise issue petitioner seeks to raise here: *Smith v. Board of Medical Quality Assurance*, 202 Cal. App.3d 316, 248 Cal. Rptr. 704 (1988). As explained below, in that case, the California Court of Appeals held that an order requiring a physician to take a competency examination did not deprive the physician of a liberty or property interest and, therefore, did not implicate the Due Process Clause. Thus, petitioner can point to no disagreement among different jurisdictions on an important federal question, or any other similar basis to justify this Court's special attention.

IV. The Board did not Deny Petitioner Due Process by Failing to Grant a Hearing before Ordering Petitioner to Take a Competency Examination.

Even if this Court were to reach the merits of the issues petitioner has raised, petitioner could not prevail. The Board's order directing petitioner to take a competency examination did not implicate the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution forbids the states from depriving any person of "life, liberty, or property" without due process. Here, petitioner argues that the Board's order deprived him of a property interest by placing his license to practice medicine in "serious jeopardy," Pet. Cert. at 32, thereby triggering due process protections. Petitioner is wrong.

Under Oregon law, the Board's order directing petitioner to take a competency examination was merely part of the Board's investigative process to determine petitioner's fitness to practice medicine:

If the board has reasonable cause to believe that any licensee is or may be unable to practice medicine . . . with reasonable skill and safety to patients, the board shall cause a competency examination of such licensee for purposes of determining the fitness of the licensee to practice medicine . . . with reasonable skill and safety to patients.

Or. Rev. Stat. § 677.420(2). Failing a competency examination ordered by the Board would have constituted “[m]anifest incapacity to practice medicine,” a ground for revoking petitioner’s license. Or. Rev. Stat. § 677.190(15). Nonetheless, the order to take the examination, by itself, did not affect petitioner’s license to practice medicine. Before the Board may revoke a physician’s license for failing a competency examination, the Board must afford the physician the opportunity for a hearing with all of the due process protections provided by Oregon’s APA. Or. Rev. Stat. § 677.208(1). Thus, the order to take a competency examination did not place petitioner’s license directly at stake, and therefore did not deprive petitioner of any property interest in that license.

Respondent has found only one reported case presenting this issue. In *Smith v. Board of Medical Quality Assurance*, 202 Cal. App.3d 316, 248 Cal. Rptr. 704 (1988), the California court rejected an argument identical to petitioner’s. That case arose under California’s statutory scheme governing medical licensing, which for present purposes is essentially identical to Oregon’s. In *Smith*, the physician argued that he was denied due process when ordered by the state board to take a medical competency examination. The court disagreed, stating in relevant part:

First, he contends that the Board’s action deprived him of the property interest represented by his license to practice medicine. Unquestionably, a physician has a vested property right in his or her medical license,

once acquired. However, in this case, the Board's proceedings and order do not jeopardize this property interest. The proceedings were conducted to determine whether there was reasonable cause to believe that Smith was an incompetent physician and resulted in an order compelling him to undergo an examination to establish this fact. It was not a disciplinary proceeding and Smith's license was not immediately at stake. Until a formal accusation is filed against a physician, his or her license is valid. Once an accusation is filed, the physician enjoys the protection of a full range of due process rights.

. . . Smith had no federal due process rights at stake at the reasonable cause proceeding.

Smith, 202 Cal. App.3d at 326-27 (citations omitted). The California court's reasoning is persuasive, and resolves the due process issue against petitioner.

Once the Board instituted proceedings to revoke petitioner's license, it held a contested case hearing under Oregon's APA, granting petitioner full due process protections. See Or. Rev. Stat. § 677.208(1); see generally Or. Rev. Stat. §§ 183.413 to 183.470 (APA provisions governing conduct of contested cases). Petitioner does not suggest that the hearing held by the Board was constitutionally deficient in any respect. Accordingly, petitioner has raised no colorable claim of a denial of due process.

CONCLUSION

Petitioner's proffered issues cannot be raised in this Court in this proceeding. Additionally, petitioner has failed to present any persuasive reason why this case is sufficiently important to merit this Court's review and resolution. Moreover,

his claims, when examined, lack merit. Accordingly, the petition for writ of certiorari should be denied.

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